

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

LE SHAWN NICKELSON,

:
Petitioner, : Case No. 1:11-cv-334
-vs- : District Judge S. Arthur Spiegel
: Magistrate Judge Michael R. Merz

Warden, Chillicothe Correctional
Institution,

:
Respondent.

DECISION AND ORDER

This habeas corpus case is before the Court on Petitioner's Motions [for] Judicial Notice of Adjudicative Facts (Doc. No. 56, 57) pursuant to Fed. R. Evid. 201.

To the extent Petitioner seeks to have the Court take judicial notice of the content of documents which are already part of the record, the request is improper. Judicial notice is a technique for placing into evidence adjudicative facts which are not otherwise of record.

Whether or not trial attorney Michael Mearan filed a written motion for discovery is not an evidentiary adjudicative fact of which judicial notice may be taken on the basis of the docket. Rather, it is an inference which can be drawn from the docket, absent evidence to the contrary. To the extent that that inference is relevant to Petitioner's case, it can be drawn without taking judicial notice.

Petitioner requests the Court to take judicial notice that "Respondent's Attorney has not submitted sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt on Count 7." (Motion, Doc. No. 55, PageID 1232.) That proposition, if it were relevant to this case,

would not be an evidentiary fact, but a conclusion of law. It is also not proper subject matter for judicial notice.

All of the issues raised in these two Motions have been raised in prior papers filed by Petitioner and dealt with extensively by the Court. Adding a request for judicial notice does nothing to change the status or propriety of prior orders.

Finally, to the extent Petitioner is seeking by these Motions to have this Court consider evidence which was not considered by the Ohio courts when they decided any of Petitioner's constitutional issues, that manner of proceeding is barred by 28 U.S.C. § 2254(d)(1). *Cullen v. Pinholster*, 131 S. Ct. 1388, 1400-01, 179 L. Ed. 2d 557 (2011).

Accordingly, Petitioner's Motions to Take Judicial Notice are denied.

February 1, 2012.

s/ **Michael R. Merz**
United States Magistrate Judge